INDEX

CITATIONS

509386—43——1

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 632

RUSSELL W. McDERMOTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 252–258) is reported at 131 F. (2d) 313.

JURISDICTION

The judgment of the circuit court of appeals was entered November 11, 1942 (R. 259), and a petition for rehearing (R. 261–266) was denied December 8, 1942 (R. 270). The petition for a writ of certiorari was filed January 7, 1943. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended

by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain the conviction.

2. Whether the provisions of the Securities Exchange Act of 1934 authorizing the Board of Governors of the Federal Reserve System to promulgate regulations governing the extension and maintenance of credit by brokers to and for their customers and making it a criminal offense to violate such regulations are an unconstitutional delegation of legislative power.

STATUTORY PROVISIONS AND ADMINISTRATIVE REGULATION INVOLVED

The pertinent provisions of the mail fraud statute, the Securities Act of 1933, the Securities Exchange Act of 1934, and Regulation T, promulgated by the Board of Governors of the Federal Reserve System pursuant to Sections 7 and 8 of the Securities Exchange Act, are set out in the Appendix, *infra*, pp. 21–30.

STATEMENT

Petitioner was indicted on March 25, 1942, in the District Court for the Southern District of Indiana on fourteen counts (R. 1–34), the first seven of which charged that he devised a scheme to defraud Marie

Langen Sweeney and other persons unknown to the grand jury and to obtain money and property from them by means of false representations, pretenses, and promises, and that he used the mails in the execution of this scheme, in violation of Section 215 of the Criminal Code (18 U. S. C. 338) (R. 1–19). Counts 8 and 9 charged that in the sale of securities by the use of the mails, petitioner employed the scheme to defraud, and obtained money and property from Marie Langen Sweeney by means of untrue statements of material facts and by omissions to state material facts, in violation of Section 17 (a) of the Securities Act of 1933 (48 Stat. 74, 84–85; 15 U. S. C. 77q (a)) (R. 19–21). Counts 10 to 14 charged that petitioner, while a member of a national securities exchange within the meaning of the Securities Exchange Act of 1934 (48 Stat. 881, 882–883; 15 U. S. C. 78c (1) and (3)), extended and maintained credit and arranged for the extension and maintenance of credit to and for a customer on securities not exempt from registration under that Act, in contravention of Regulation T promulgated by the Board of Governors of the Federal Reserve System pursuant to Sections 7 and 8 of the Act (48 Stat. 881, 886–889; 15 U. S. C. 78g, 78h) (R. 21–33).

Petitioner demurred to counts 10 to 14 on the ground that Sections 7 and 8 of the Securities Exchange Act authorizing the Board of Governors to promulgate regulations governing the permis-

sible limits of credit to be extended by brokers are an unlawful delegation of legislative power (R. 35); the demurrer was overruled (R. 36).

After trial, the jury found petitioner "guilty, as charged in the indictment" (R. 225), and he was sentenced generally to five years' imprisonment (R. 226). The circuit court of appeals affirmed the conviction (R. 259).

The Government's case may be summarized as follows:

Petitioner was a partner in the brokerage firm of Moore, McLean and McDermott, and had almost complete charge of the Indianapolis, Indiana, office of the firm (R. 167; see also R. 128, 129). During the period covered by the indictment—September 26, 1938, to May 31, 1939 (R. 2)—the firm was a member of the New York Stock Exchange (R. 37). Mrs. Marie Langen Sweeney, a housewife who was ignorant of financial transactions, especially those in securities (R. 98, 99, 102, 110), was introduced to petitioner by her husband, who had had previous securities dealings with petitioner (R. 98, 111). In these dealings, Mr. Sweeney, who had no means of his own, had used funds advanced to him by Mrs. Sweeney,[1] and she had also guaranteed his account with petitioner (R. 111). At her suggestion Mr. Sweeney, who had lost large sums of his wife's money, discontinued

[1] Mrs. Sweeney had inherited a sizeable fortune from her first husband (R. 98, 111).

his stock speculations, and thereafter petitioner called Mrs. Sweeney to his office for the purpose of closing Mr. Sweeney's account (R. 98–99, 111). There was a net balance in the account of about $11,000 due Mrs. Sweeney (R. 99, 112). On petitioner's representations that he would recoup past losses and make her a profit, Mrs. Sweeney turned these funds over to him under a power of attorney to trade with them in an account under the fictitious name of K. K. Kado (R. 99, 100, 101).[2] The theory of the Government's case was that petitioner defrauded Mrs. Sweeney in three different ways, as follows: (1) by obtaining and misappropriating certain of Mrs. Sweeney's bonds; (2) by overtrading her account for the purpose of gaining fees and commissions, despite his representations to her that he would "go easy" (R. 100), would "do the best he could," and "would handle everything carefully" (R. 100); and (3) by unloading upon her at prices in excess of the market values certain stocks which his firm had in its own portfolio. In the interest of clarity and orderly presentation, we shall delineate the Government's proof on this aspect of the case in the order noted.

(1) Petitioner and one James G. Allio were close friends (R. 79, 133, 134, 136, 137), and Allio had a trading account with petitioner's firm in

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[2] Mrs. Sweeney stated that she desired to use the fictitious name to hide her identity, especially from her husband (R. 99, 112).

which petitioner had a definite financial interest and in which he traded for his personal account pursuant to discretionary powers vested in him by Allio (R. 133, 134, 161). Petitioner's trading in this account was carried on through the "free-riding" of securities and the "matching" or "kiting" of checks[3] (R. 54, 55, 62, 64, 147). These operations and the decline in the market found the account on April 7, 1939, with losses in excess of $11,090.43 (R. 158). Neither petitioner nor Allio had sufficient funds to cover the loss (R. 136, 200). Petitioner thereupon represented to Mrs. Sweeney that her K. K. Kado account was in need of additional margin and secured from her two Treasury bonds, one for $10,000 and one for $5,000, both of which he sold (R. 103–104, 165). The $10,000 bond brought $11,211.12, which was deposited in the Allio account (R. 51), thus wiping out the loss, and the $5,000 bond brought $5,599.29, which was credited to the firm account of petitioner's wife and later deposited by petitioner in the joint bank account owned by him and his wife, the money ultimately being used to pay a bank loan owed by petitioner and in acquiring for petitioner a one-half interest in certain real estate (R. 50, 51, 70, 130, 201). Petitioner attempted to cover his method of acquiring the $10,000 bond by having prepared a series of fictitious pre-dated letters running between himself and Allio, the purport of which was

[3] These operations are discussed at p. 11, *infra*.

that the bond belonged to Allio, and which letters he signed and induced Allio to sign (R. 133, 140; see also R. 53, 66–67). Petitioner attempted to explain his handling of the $5,000 bond on the ground that if the money had been placed in Mrs. Sweeney's account it would have been frozen (R. 195–196; but see R. 53).

(2) As soon as petitioner had persuaded Mrs. Sweeney to turn over the management of her K. K. Kado account to him, he began to overtrade in it. Each trade in securities earned a commission for petitioner's firm payable out of the equity in the account (see R. 43, 51, 160). On the first day alone petitioner purchased a total of 2,000 shares of stock at a cost of $29,496.50, which purchases resulted in an excess over the legally required margin of $526.[4] To meet this deficit, 200 shares of this stock were sold on the same day. The commissions on these transactions was $291, and the total commissions for the first two days of trading amounted to $996, or 8.84 per cent of the original deposit in Mrs. Sweeney's account. (R. 159.) An analysis of her account showed "that frequently securities were purchased one day, sold again the same day, purchased the next day and sold again the next day" (R. 160). A total of 36,497 shares were traded in the account during its life of eight months. The

[4] Margin required by Regulation T was 40 per cent of $29,496 or $11,798 (R. 159). Since the original deposit in the account was $11,272.04 (*ibid.*), there was a deficit of approximately $526 (*ibid.*).

total cost of the purchases was $886,771.87 and the total sales $871,354.24. The trading losses plus interest and taxes amounted to $27,090.27, and commissions earned by petitioner's firm equaled $10,631.50. The commissions when added to the interest charged to Mrs. Sweeney totaled $11,504.02, or $231.98 more than the original deposit in the account of $11,272.04. (R. 159; see also R. 43.)[5]

Petitioner frequently called upon Mrs. Sweeney for more margin (R. 159). On one occasion when she was unable to meet such a call, petitioner drew a check on the firm payable to her in the amount of $7,660 and deposited it to her credit at the Banker's Trust Co. where previously thereto Mrs. Sweeney had had no account (R. 46, 116). Simultaneously, petitioner had her sign a check in the amount of $7,160 payable to the firm and drawn on the same bank (R. 116). The net result of the transaction was to answer the call for margin, so far as the books showed on their face, and to leave Mrs. Sweeney with a credit of $500 in the

[5] The turnover of securities in the account is illustrated by the following analysis of the trading in one security: on October 4, 1938, 100 shares of Alleghany Corporation were bought. They were sold October 7. On January 4, 1939, 500 shares were bought; on January 5, 500 shares; on January 10, 200 shares; on January 11, 300 shares, and on March 9, 200 shares. The stock was sold as follows: 200 shares on March 10; 300 shares on March 13; 100 shares on March 14; 200 shares on May 2; and 100 shares on May 24. (R. 160.)

bank, but with a diminished equity of $500 in her K. K. Kado account (R. 46–47). On other occasions when petitioner called for more margin, a cash account was opened in the name K. K. Kado (R. 160). By virtue of this device the margin requirements could be circumvented in that seven days are allowed to settle a cash transaction (R. 160; see also R. 54). No money, however, was paid on the cash accounts; rather the method known as "free-riding" was pursued (R. 160).[6] Any losses which resulted were transferred, however, to the margin account and the trading continued in that account (R. 160).

(3) Petitioner's firm had in its own portfolio certain securities which had suffered a drastic decline and which had a poor and inactive market (R. 40, 73, 76, 126). All of these securities were traded in on the New York Curb Exchange (R. 124–125, 126). The partners were in disagreement as to how the loss on these securities was to be distributed and as to which of them would undertake the liquidation (R. 78, 125–127). Petitioner suggested to another member of the firm and to the firm's Chicago office manager that he would "work" the securities into a customer's account (R. 76, 78, 126). On April 29 and May 24, 1939, petitioner proceeded to "work" these securities into Mrs. Sweeney's K. K. Kado account

[6] For a description of this method, see p. 11, *infra*.

(R. 73, 77.).[7] They were sold to Mrs. Sweeney at prices ranging from five to eight points over the closing prices quoted on the New York Curb Exchange (R. 73–74, 77, 125–126, 160). These operations netted a profit to the firm, but cost Mrs. Sweeney $2,362.50, the total difference between the quoted prices of the securities and the amount paid for them out of her account (R. 76, 78, 160).

The net result of petitioner's operations in Mrs. Sweeney's account was that she ultimately received less than $100 out of her initial investment of about $11,000 eight months earlier (R. 106–107).

In respect of the violations of Regulation T, the evidence shows that petitioner dealt in the accounts of other persons as his own and in these operations extended to the accounts excessive amounts of credit. As already noted, *supra*, pp. 5–6, petitioner had discretionary authority to deal in the account of James G. Allio and in pursuance of this authority he did trade in the account in large amounts (R. 134). In fact, petitioner admitted in an investigation before the Securities and Exchange Commission that he did all of the trading in the account from July 1938 until the account was closed on May 31, 1939 (R. 150). In addition, petitioner traded in the

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[7] He also "worked" some of the securities into the account of one W. Osborn, another customer (R. 77).

account of Phillip Allio, James' brother, which account was opened by James in Phillip's name (R. 137), and also in the account of one Russell Faux, a friend of James; this latter account was opened by James at the suggestion of petitioner (R. 138). Both Phillip Allio and Faux testified that they had nothing to do with the accounts opened in their names; that they did not trade in them and that the accounts were controlled by James Allio (R. 141, 142). Throughout the history of these three accounts James Allio was without sufficient funds to meet the demands made upon him (R. 135, 136). In order to supply the necessary funds to these accounts, petitioner indulged in the practices known as "matching checks" (R. 55, 56) or "kiting checks" (R. 59) and "free riding" (R. 55, 62). The first two terms refer to the practice whereby petitioner would draw checks on the firm payable to Allio in order that Allio would have on deposit funds with which to meet the checks drawn by him to the firm in payment for securities. The term "free riding" describes the practice of paying for a security out of the funds obtained from the sale of it. These practices progressed to such a degree that petitioner took over the management of Allio's bank account to the extent of having Allio issue to him blank checks signed in advance, and petitioner would often deposit checks in Allio's account without even handing them to the latter (R. 136–137). The net result of these operations

was a continuous extension of credit by the firm to the Allio account and the other accounts controlled by him.

In respect of count 10 (R. 21–29), the evidence showed that on May 26, 1939, petitioner extended credit to Allio in the amount of $1,805, which resulted in "under margining" the account by $808.23 (R. 153–154). As to count 11 (R. 29–30), the proof was that petitioner acquired, on April 1, 1939, in a cash account of James Allio, 300 shares of Montgomery Ward stock while the account had a debit balance of $10,285.93 (R. 68, 154, 155). The stock was paid for from the proceeds of the sale of it (R. 68, 154, 155), thus completing a case of "free riding."[8] In respect of count 12 (R. 30–31), petitioner on numerous occasions extended credit in varying amounts to the Allio accounts and purchased securities therefor when the account was undermargined and in the "red" (R. 63, 64, 65, 67, 147, 149, 151, 154).

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[8] The details of the transaction were: On March 31, 1939, there were in this account securities of the value of $29,679. The debit balance was $24,464.16. On that date a check, which was not entered on Allio's ledger, for $8,000, was issued to Allio, thus increasing the debit balance to $32,-464.16. On April 1, 1939, stocks of the value of $12,778.23 were sold out of the account leaving a debit balance of $19,-685.93. The securities which remained in the account after the sale were worth $9,400. Thus there was a deficiency in the account before the purchase of the Montgomery Ward stock, of $10,285.93. On April 1, 1939, 300 shares of Montgomery Ward stock were acquired at a cost of $13,926, which was not paid until April 5, 1937, when the 300 shares were sold. (R. 154–155.)

As to counts 13 and 14 (R. 31–33), petitioner, on May 12 and 9, 1939, respectively, extended credit in the James Allio and Faux accounts for longer periods than were allowed by Section 4 (a) and (c) of Regulation T (see pp. 28–30, *infra*). These transactions consisted of "free riding" the securities involved; both the May 9 and 12 purchases were paid for on May 22 by liquidation of the very securities purchased on the two earlier dates. (R. 67, 155, 156.)

In addition to the specific proof outlined above, there was evidence that on many occasions petitioner was cautioned by the Chicago office manager that numerous transactions in the Allio accounts were violative of the "Securities Act" and of Regulation T (R. 54, 56, 57–60; see also R. 79–80). Also, the record is replete with instances of false documents issued by petitioner and instances in which he sought to have matters deleted from his firm's records or kept from being placed therein (R. 52, 53, 58). Some of these documents he admitted were false (R. 203, 204). One his attorney admitted to be false (R. 206–207). Others were internally inconsistent and bear evidence of falsity on their face (R. 144, 204, 207).

ARGUMENT

I

Petitioner contends generally (Pet. 9–14) that the evidence was insufficient to support the verdict. He argues specifically that there was no

misappropriation of either the $10,000 or the $5,000 bond belonging to Mrs. Sweeney because, in effect, the transactions in connection with them were consummated with Mrs. Sweeney's knowledge and consent. He asserts also that there was an insufficiency of evidence to support counts 10 to 14, and especially count 12, in that as to the latter count the court below was guilty of an error of omission in failing to take into account certain transactions which, had they been considered, would have shown that petitioner was innocent of any wrongdoing. There is no merit in these contentions.

The evidence, summarized in the Statement, *supra*, pp. 4–13, shows that petitioner set about deliberately to defraud Mrs. Sweeney and that he knowingly transgressed Regulation T in his manipulations of the accounts of both of the Allios, of Faux, and of Mrs. Sweeney. In respect of the fraud counts, 1 to 9, the proof is clear that petitioner knew Mrs. Sweeney was unfamiliar with dealings in securities and was untutored in business affairs generally. He gained her confidence and knew that he had it. It was a very simple matter for him to take advantage of her ignorance and to prevail upon her to turn over to him money and the bonds in question when and as he desired. Government witnesses testified that the proceeds from the sales of the bonds were not returned to Mrs. Sweeney's account (see p. 6, *supra*). If petitioner had had honest intentions in dealing with

the bonds, there would have been no necessity for the various manipulations of the moneys accruing from the sales of the bonds, i. e., the crediting of the proceeds of the sale of the $10,000 bond to the Allio account to wipe out petitioner's losses, the depositing of the money from the sale of the $5,000 bond in the firm account of petitioner's wife, the subsequent depositing of the money in petitioner's personal bank account, the paying of petitioner's personal bank loan with part of the proceeds and the purchase of a half interest in certain real estate with another part. Moreover, petitioner's handling of the bonds can not be dissociated from the other aspects of his fraudulent scheme, viz, the excessive overtrading in Mrs. Sweeney's account for the purpose of gaining commissions, and the sale to her of firm-owned stocks of doubtful value at exhorbitant prices. As the court below summed up this aspect of the case, petitioner "in bad faith and in violation of his fiduciary duties, without regard to the market conditions and prices and without regard to the net worth of her account, the limitations of law and the rules of the New York Stock Exchange pertaining thereto, * * * bought and sold, at her risk, stocks and bonds and obligated her to pay, to his personal profit, commissions and fees" (R. 253). Petitioner's conduct in thus abusing his fiduciary position for his own profit was clearly in transgression of the mail fraud

statute and the fraud provisions of the Securities Act of 1933. *Pandolfo* v. *United States,* 128 F. (2d) 917 (C. C. A. 10), certiorari denied, October 12, 1942, No. 223, this Term; *Glover* v. *United States,* 125 F. (2d) 291 (C. C. A. 5), certiorari denied, 316 U. S. 690; *United States* v. *Groves,* 122 F. (2d) 87, 90 (C. C. A. 2), certiorari denied, 314 U. S. 670; *Leche* v. *United States,* 118 F. (2d) 246 (C. C. A. 5), certiorari denied, 314 U. S. 617; *Shusan* v. *United States,* 117 F. (2d) 110, 115 (C. C. A. 5), certiorari denied, 313 U. S. 574; *United States* v. *Buckner,* 108 F. (2d) 921, 926, 927 (C. C. A. 2), certiorari denied, 309 U. S. 669.

In respect of the violations of Regulation T, the evidence is clear that petitioner "matched" or "kited" checks and that he "free rode" securities. He was constantly pressed to supply margin in the Allio accounts by the Chicago office manager (R. 57–60; see also R. 86–87), a result that hardly would have taken place had he not been extending credit beyond the limits allowed by law. Also, he was warned frequently concerning the illegal aspect of his trading and was himself aware of it (R. 54, 56, 57–60, 79–80). He knew well the extent of Allio's financial responsibility as well as of his own. His trading was at a rate and volume far in excess of the limits permissible to one of such limited responsibility. The rapid turnover of securities, the in and out

trading, the large volume, are all indicative of trading on credit and were necessitated by the demands for the margin required by law. As to the evidence in connection with count 12 relied upon by the court below (R. 254) and challenged by petitioner (Pet. 9), it is sufficient to point out that the court's summation is a substantial reproduction of the testimony of Government witness Young (R. 154–155). Petitioner can not complain that the jury believed the testimony of the Government witness and failed to give credence to what petitioner claims is the correct analysis of the transactions.

Moreover, in respect of the entire case, petitioner's general conduct must be taken into account. He falsified records and letters, sought to delete items from some records and to destroy others, and attempted to keep incriminating facts from appearing on the records (R. 52, 53, 58, 66, 133, 140–141, 203–204). Such conduct is incompatible with petitioner's claim of innocence and good faith. In the light of all the testimony the case was preeminently one for the determination of the jury on all the counts.

Finally, since, as we have shown (*supra*, pp. 5–10) and as the court below indicated (R. 158), the evidence was amply sufficient to support the fraud counts and since the general sentence of five years' imprisonment imposed upon petitioner did not exceed the maximum which might have been imposed under any of those, the alleged insuf-

ficiency of the evidence to support the remaining counts is immaterial on appeal. *Whitfield* v. *Ohio,* 297 U. S. 431, 438; *United States* v. *Trenton Potteries,* 273 U. S. 392, 402; *Brooks* v. *United States,* 267 U. S. 432, 441; *Pierce* v. *United States,* 252 U. S. 239, 252–253; *Abrams* v. *United States,* 250 U. S. 616, 619; *Claassen* v. *United States,* 142 U. S. 140, 146–147.

II

In respect of counts 10 to 14, petitioner also contends (Pet. 7–8) that the provisions of the Securities Exchange Act of 1934, which confer upon the Board of Governors of the Federal Reserve System the power to issue regulations governing the extension of credit by brokers (Secs. 7 and 8, *infra,* pp. 22–25) and make it a criminal offense to violate such regulations (Sec. 32, *infra* p. 25) are an unconstitutional delegation of legislative power. This contention is untenable.

In the first place, as we have already said (*supra,* p. 17), the general sentence of five years' imprisonment imposed upon petitioner did not exceed the maximum imposable under any of the fraud counts (1 to 9), the legal sufficiency of which is not questioned; hence the claimed invalidity of the counts grounded upon the Securities Exchange Act and Regulation T is immaterial. (See cases cited at pp. 17–18, *supra.*)

Petitioner's contention is, in any event, without

merit. It is settled that Congress may delegate to an administrative agency power to promulgate rules and regulations to effectuate the legislative purpose, provided that Congress defines the general policy and establishes adequate and intelligible standards for the guidance and governance of administrative action. *Opp Cotton Mills* v. *Administrator of the Wage and Hour Division,* 312 U. S. 126, 142–146; *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, 397–400; *United States* v. *Rock Royal Co-op.,* 307 U. S. 533, 574–577; *Mulford* v. *Smith,* 307 U. S. 38, 48–49; *Currin* v. *Wallace,* 306 U. S. 1, 16–18; *Radio Comm'n* v. *Nelson Bros. Co.,* 289 U. S. 266, 285; *United States* v. *Shreveport Grain & El. Co.,* 287 U. S. 77, 85; *N. Y. Central Securities Co.* v. *United States,* 287 U. S. 12, 24–25; *Hampton & Co.* v. *United States,* 276 U. S. 394, 406–411; *Avent* v. *United States,* 266 U. S. 127, 130–131; *United States* v. *Grimaud,* 220 U. S. 506, 516–518. And it is equally clear that Congress may make violation of the administrative regulations a crime. *Opp Cotton Mills* v. *Administrator of the Wage and Hour Division,* 312 U. S., at 134, 142–146; *United States* v. *Shreveport Grain & El. Co.,* 287 U. S., at 85; *Avent* v. *United States,* 266 U. S., at 131; *United States* v. *Grimaud,* 220 U. S., at 515, 517, 518; *Cerritos Gun Club* v. *Hall,* 96 F. (2d) 620 (C. C. A. 9); cf. *Mulford* v. *Smith,* 307 U. S., at 44, 48–49; *Currin* v. *Wallace,* 306 U. S., at 7, 16–18.

The provisions of the Securities Exchange Act here assailed meet all the tests laid down in the cases. The legislative policy to prevent the excessive use of credit for the purchase or carrying of securities is explicitly stated in Section 7 (a) of the statute (*infra,* p. 22) and the standards for administrative action are set forth clearly and in detail (*infra,* pp. 22–25). To use the language of this Court in *Sunshine Coal Co.* v. *Adkins,* 310 U. S., at 398, "The standards which Congress has provided here far exceed in specificity others which have been sustained. Certainly in the hands of experts the criteria which Congress has supplied are wholly adequate for carrying out the general policy and purpose of the Act."

CONCLUSION

The decision below is correct, and there is involved no conflict of decisions or question of general importance. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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February 1943.